

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

MADHU JAIN,)
PLAINTIFF)
v.)
A CAPE ANN WHALE)
WATCH, INC.)
DEFENDANT)

C.A. No. 05-11267 MEL

**PLAINTIFF'S MOTION TO ADMIT THE DEPOSITIONS OF ALICE BERG, LISA
BODNER and JONATHAN BODNER**

When defendant, after delay, produced a list of passengers on the Hurricane II, on the day of the fall, the plaintiff noticed the depositions of the only three, known passengers who remembered the event.

Plaintiff's counsel and defendant's counsel traveled to New Jersey, where the three witnesses resided and conducted the depositions. The depositions are certified by a notary (Exhibits 1, 2, 3).

The depositions themselves contain testimony that the witness live in New Jersey and thus are more than 100 miles from Boston (Exhibits 4, 5, 6)

The law on the subject follows:

Rule 32. Use of Depositions in Court Proceedings [Caution: For amendment effective December 1, 2007, see prospective amendment note below.]

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose

permitted by the Federal Rules of Evidence.


(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

Defendant attended and had an opportunity to object to the conduct of these depositions and the testimony and questions.

This testimony is particularly trustworthy because these three witnesses have no outside involvement in the case. The evidence is very probative on the issue of liability.

WHEREFORE, the plaintiff respectfully moves that the Depositions be admitted into evidence and asks that parts that are very important to the plaintiff may be read to the Court.

By the Plaintiff,


JEFFREY C. CONIARIS
BBO# 555907
84 State Street
Boston, MA 02109
(617) 720-5888

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party and any party appearing pro se by (first class mail, postage prepaid or by hand delivery).

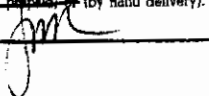
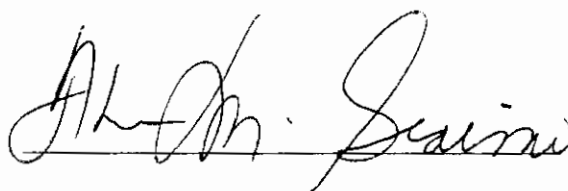
Dated 6/6/07 

EXHIBIT 1

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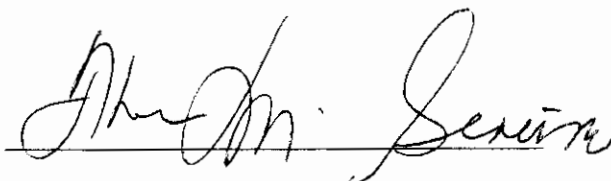
I, THERESA M. GIAIMO, a Certified New Jersey Shorthand Reporter and Notary Public of the State of New Jersey, certify that the foregoing is a true and accurate transcript of the proceedings held at the place and on the date hereinbefore set forth.

A handwritten signature in cursive script, appearing to read "Theresa M. Giaimo", written over a horizontal line.

THERESA M. GIAIMO, CSR.

EXHIBIT 2

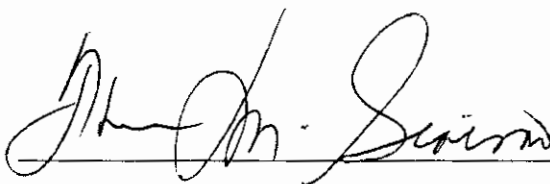
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21 THERESA M. GIAIMO, CSR.
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EXHIBIT 3

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21 THERESA M. GIAIMO, CSR.
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EXHIBIT 4

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1 A. **Kendall Park.**
 2 Q. Where is that?
 3 A. **In Middlesex County.**
 4 Q. What state?
 5 A. **New Jersey.**
 6 Q. Do you have any incapacity or are you on
 7 any medication that would substantially affect your
 8 ability to give testimony here today?
 9 A. **No.**
 10 Q. What is your date of birth?
 11 A. **12-14-70.**
 12 Q. And, approximately, how far away from
 13 Boston in Kendall Park, New Jersey?
 14 A. **Uh-hum, 350 or 400 miles.**
 15 Q. Are you married?
 16 A. **Yes.**
 17 Q. What is your wife's name?
 18 A. **Lisa.**
 19 Q. And last name is Bodnar?
 20 A. **Yes.**
 21 Q. Thanks. Do you have any children?
 22 A. **Yes, I have two.**
 23 Q. Do you have a job outside the home?
 24 A. **Yes, I do.**
 25 Q. What do you do?

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1 A. **I am a lab supervisor in a hospital.**
 2 Q. And did you visit Massachusetts in
 3 August of 2004?
 4 A. **Yes, I did.**
 5 Q. Who accompanied you on that visit?
 6 A. **My wife and my two my children, and my in-laws**
 7 **were there.**
 8 Q. Where did you stay during that visit?
 9 A. **We stayed in New Hampshire, Spofford - S. P. O.**
 10 **F F O. R. D.**
 11 Q. We're talking about that August 19, 2004
 12 day. Did you travel to Gloucester on that day?
 13 A. **Yes, I did.**
 14 Q. How did you get that?
 15 A. **My car.**
 16 Q. Who, if anyone, went in the car with
 17 you?
 18 A. **My wife and kids.**
 19 Q. Did you take a Cape Ann Whale Watch tour
 20 during that visit on that day?
 21 A. **Yes.**
 22 Q. Do you know how the trip was paid for?
 23 A. **Cash.**
 24 Q. Cash by you?
 25 A. **I don't remember.**

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7

1 Q. Okay. Now, referring to that day, can
 2 you name the people you knew who went on that whale
 3 watch with you?
 4 A. **My family, my wife, two children, my**
 5 **mother-in-law, father-in-law, a couple of friends**
 6 **from the camp.**
 7 Q. And when I refer to Miss Jain, it's the
 8 lady that fell. Did you know her before going on
 9 this whale watch?
 10 A. **No, I did not.**
 11 Q. Did you talk to her since the whale
 12 watch?
 13 A. **No, I did not.**
 14 Q. Could you describe what you did before
 15 you got on the whale watch boat that day?
 16 A. **I think we -- I think we drove there and went**
 17 **right on the boat.**
 18 Q. Did you bring anything on board with
 19 you?
 20 A. **No.**
 21 Q. Do you remember what you were wearing?
 22 A. **No.**
 23 Q. Do you remember whether you were wearing
 24 sneakers or shoes?
 25 A. **Definitely had sneakers on.**

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1 Q. At any time, were you warned about
 2 anything by any crew members?
 3 A. **No.**
 4 Q. Did you ever receive my instructions by
 5 any crew members on that day?
 6 A. **No.**
 7 Q. Can you tell me what you remember from
 8 that day about getting onto the Hurricane II?
 9 A. **Getting onto it? I didn't have problems**
 10 **getting onto it.**
 11 Q. How about the trip itself, did you
 12 remember anything about the trip?
 13 A. **Other than them telling us we didn't see whales**
 14 **and we'd seen quite a few, no, it was a nice trip.**
 15 **We had a nice time.**
 16 Q. How was the weather going out?
 17 A. **It was sunny day, little chilly when we got out**
 18 **there. I believe, my wife sat inside at some point,**
 19 **but, relatively, it was a nice day.**
 20 Q. At some point you finished the whale
 21 watch and the Hurricane II docked and you had to get
 22 off; is that correct?
 23 A. **Yes.**
 24 Q. How long after the ship docked, did
 25 people start getting off?

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EXHIBIT 5

1 at a certain point or that you were in an approximate
2 area of that gang plank. The lady who fell that day
3 was alleged to have fallen - I am going to refer to
4 her as Miss Jain. Okay?

A. Okay.

6 Q. That's about it. Do you have anything
7 you would like to put on the record?

8 MR. RAUWORTH: Not that I can think of at
9 this point.

10 BY MR. CONIARIS:

11 Q. Could you please state your name, for
12 the record?

13 A. Alice Berg.

14 Q. Do you have any incapacity or are you on
15 any medication that would substantially affect your
16 ability to give testimony here today?

17 A. No.

18 Q. Approximately, how far away from Boston
19 do you live?

20 A. From Boston, two hundred - under 300, I think.
21 I'm not good with mileage, but I would say - venture
22 to say under 300.

23 Q. Could I say over two - you live over two
24 hundred miles away from Boston?

25 A. Yes.

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1 Q. Are you married?

2 A. Yes, I am.

3 Q. Do you have any children?

4 A. Yes, I do; three.

5 Q. What are their names?

6 A. Richard, Glen and Lisa. You need their last
7 names?

8 Q. No. I think that's all right. Do you
9 presently work outside the home?

10 A. No.

11 Q. What's the highest level of education
12 that you completed?

13 A. High School.

14 Q. And did - I already asked you your
15 present address?

16 A. Not you, the stenographer.

17 Q. Can you state your present address?

18 A. In Jersey here, 603 Regency Drive, Franklin
19 Park 08823.

20 Q. Did you visit Massachusetts in August of
21 2004?

A. Yes, I did.

23 Q. Who, if anyone, accompanied you on that
24 visit?

25 A. My husband, my daughter, Lisa, her husband

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1 Jonathan, their two children and my grandson.

2 Q. When you were in Boston, where did you
3 stay?

4 A. We drove directly to the whale watch, Cape Ann
5 Whatle Watch.

6 Q. Did your stay in a hotel during this
7 visit?

8 A. We were in New Hampshire at the time by Kean
9 campus. We took a day trip over to the whale watch?

10 Q. How did you drive that day?

11 A. By car.

12 Q. One car or two cars?

13 A. One car.

14 Q. Who drove in that car?

15 A. My son-in-law, Johnathan.

16 Q. Who was in that car?

17 A. We all were.

18 Q. This was what, on August 19th, 2004?

19 A. Yes, correct.

20 Q. And did you travel at some point down to
21 Gloucester?

22 A. That's where we went to.

23 Q. Did you take a Cape Ann Whale Watch
24 during your visit to Gloucester?

25 A. Yes.

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1 Q. Do you know how the trip was paid for?

2 A. I believe on my husband's charge card. I'm not
3 quite sure.

4 Q. That was - that was the only whale watch
5 trip that you took during this August of 2004?

6 A. My first and ever.

7 Q. First and last?

8 A. No. It was good. It was nice, nice trip.

9 Q. Can you name, referring to that date,
10 can you name the people who you knew who went on that
11 Whatle Watch?

12 A. People that were with me in my car.

13 Q. Or people that you knew?

14 A. Nobody.

15 Q. You didn't know anybody, except the
16 people in your car?

17 A. Correct.

18 Q. Who were those people?

19 A. My husband, my daughter, Lisa, her husband,
20 their two children and my grandson.

21 Q. Now, you arrived by car?

22 A. Correct.

23 Q. Did you do anything before you got onto
24 the Hurricane?

25 A. No, parked the car and went to the boat.

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EXHIBIT 6

1 MR. RAUWORTH: Mostly, so there's not two
 2 people talking at once because it's too tough.
 3 Q. You can take a break at any time.
 4 A. **Any time, very good.**
 Q. Let's see, if you can state your name
 6 for the record?
 7 A. **Lisa Bodnar.**
 8 Q. Where do you currently reside?
 9 A. **28 Winant Road, Kendall Park, New Jersey.**
 10 Q. Do you have any incapacity today or are
 11 you on any medication that will substantially affect
 12 your ability to give testimony here today?
 13 A. **No.**
 14 Q. Approximately, how far from Boston do
 15 you live?
 16 A. **Oh, I think it must be over three and one-half**
 17 **or four hours.**
 18 Q. So over 200 miles?
 19 A. **Yes.**
 20 Q. Are you married?
 21 A. **Yes.**
 22 Q. What's your husband's name?
 23 A. **Johnathan Bodnar.**
 24 Q. And are you currently employed outside
 25 of the home?

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1 A. **No, I am not.**
 2 Q. Do you have any children?
 3 A. **Two.**
 4 Q. What are their names?
 5 A. **Lorissa and Lindsey.**
 6 Q. And how old are Lorissa and Lindsey?
 7 A. **Lindsey is 11-1/2 and Lorissa is 2-1/2.**
 8 Q. Did you visit Massachusetts in August of
 9 2004?
 10 A. **Yes, I did.**
 11 Q. Who, if anyone, accompanied you on that
 12 visit?
 13 A. **My parents and my nephew.**
 14 Q. Where did you stay during that visit up
 15 in Massachusetts?
 16 A. **Overnight?**
 17 Q. **Yes.**
 18 A. **I did not stay in Massachusetts. We drove back**
 19 **to where we were staying in New Hampshire.**
 20 Q. You stayed in New Hampshire?
 21 A. **Tes.**
 Q. Were you on vacation?
 23 A. **Yes, I was.**
 24 Q. How long did the vacation last?
 25 A. **About 10 days.**

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1 Q. At some point, did you travel to
 2 Gloucester?
 3 A. **Yes, I did.**
 4 Q. Can you tell me the date that you
 5 travelled to Gloucester?
 6 A. **On the 19th of August, 2004.**
 7 Q. How did you get to Gloucester?
 8 A. **Drove in my vehicle.**
 9 Q. Who accompanied you in your vehicle?
 10 A. **My two parents, my two kids and my nephew, and**
 11 **my husband.**
 12 Q. And did you take a Cape Ann Whale Watch
 13 during your visit to Massachusetts during that period
 14 of time?
 15 A. **Yes, we did.**
 16 Q. Do you know how that whale watch was
 17 paid for?
 18 A. **My father.**
 19 Q. You only took one whale watch cruise
 20 during that visit?
 21 A. **Right.**
 22 Q. Now, who went on that actual whale watch
 23 on the Hurricane II with you?
 24 A. **Myself, my two daughters, my husband, my two**
 25 **parents and my nephew.**

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1 Q. Did you do anything before you got on
 2 the Hurricane II?
 3 A. **No, we actually drove straight there.**
 4 Q. Did you bring anything on board?
 5 A. **My diaper bag, my pocketbook.**
 6 Q. Do you remember what you were wearing?
 7 A. **No, I do not.**
 8 Q. How about shoes, do you remember?
 9 A. **Sneakers.**
 10 Q. Were you instructed by anybody to bring
 11 anything with you for that whale watch?
 12 A. **No.**
 13 Q. Were you instructed about anything by
 14 any member of the crew on that whale watch?
 15 A. **To bring on the boat?**
 16 Q. **No.** Did you receive any instructions
 17 about anything?
 18 A. **No, just make sure we were there half an hour**
 19 **before the boat would take off or we would probably**
 20 **miss the ride.**
 21 Q. Could you tell me what you remember
 22 about the ride, about getting onto the ship?
 23 A. **We parked the car. We were walking around to**
 24 **come over an, I guess, it's a waterway, over that**
 25 **direction to go up on the boat that was parked on the**

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